

(5)
No. 95-1621

Supreme Court, U.S.
FILED
NOV 12 1996

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HARBOR TUG AND BARGE COMPANY,
vs. *Petitioner,*
JOHN PAPAI, ET UX,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

ERIC DANOFF
Counsel of Record
GRAHAM & JAMES LLP
One Maritime Plaza, Suite 300
San Francisco, CA 94111
(415) 954-0200
RICHARD K. WILLARD
PETER LICHTENBAUM
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
Counsel for Petitioner

THOMAS J. BOYLE
Counsel of Record
LAW OFFICES OF
THOMAS J. BOYLE
57 Post Street, 8th Floor
San Francisco, CA 94104
(415) 434-4546
Counsel for Respondent

PETITION FOR CERTIORARI FILED APRIL 9, 1996
CERTIORARI GRANTED OCTOBER 1, 1996

BEST AVAILABLE COPY

89 pp

TABLE OF CONTENTS

	Page
Relevant Docket Entries in the United States District Court for the Northern District of California	1
Docket Entries Nos. 1-36 in the United States District Court for the Northern District of California	10
Complaint for Personal Injuries and Damages Under the Jones Act and the General Maritime Law; Loss of Consortium	14
Declaration of Eric Danoff in Support of Defendant's Motion for Summary Judgment	19
Defendant's Statement of Undisputed Facts	52
Declaration of Marina V. Secchitano in Opposition to Motion for Summary Judgment	56
First Amended Complaint for Personal Injuries and Damages Under Section Five of the Longshoremen's and Harbor Workers' Compensation Act; Loss of Consortium	63
Declaration of Thomas J. Boyle	67
Deposition of Marina V. Secchitano	68
Excerpts from Harbor Tug and Barge and Inland-boatman's Union of the Pacific Deckhands Agreement....	71
Plaintiff's Statement of Undisputed Facts	80
Court's Rulings	81

The following opinions and orders of the United States Court of Appeals for the Ninth Circuit, the U.S. District Court for the Northern District of California, and the U.S. Department of Labor and relevant statutes have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the United States Court of Appeals, dated September 25, 1995	1a
---	----

TABLE OF CONTENTS—Continued

	Page
Order Of The District Court Granting Partial Summary Judgment to Defendant Harbor Tug and Barge Company, dated May 29, 1990	22a
Order Of The District Court, Denial of Reconsideration and Statement of Grounds for Immediate Appeal 28 U.S.C. § 1292(b), dated August 17, 1990	24a
Order Of The District Court Confirming Summary Adjudication that Plaintiff John Papai Was Not A Seaman, dated April 6, 1992	26a
Judgment of the District Court in Favor of Defendant Harbor Tug and Barge Company, dated December 28, 1992	28a
Decision and Order of the United States Department of Labor, dated August 27, 1992	30a
Relevant Statutes	58a

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-90-0111-CAL

JOHN PAPAI, JOANNA PAPAI,
Plaintiffs,
 vs.
 HARBOR TUG & BARGE COMPANY,
Defendant.

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1/12/90	1	COMPLAINT (Summons(es) issued) (tl) [Entry date 04/23/91]
2/12/90	6	ANSWER by defendant Harbor Tug & Barge C to complaint [1-1] (tl) [Entry date 04/23/91]
5/24/90	20	FIRST AMENDED COMPLAINT [1-1] by plaintiff John Papai, plaintiff Joanna Papai; jury demand (tl) [Entry date 04/23/91]
6/19/90	24	ANSWER by defendant Harbor Tug & Barge C to first amended complaint [20-1] (tl) [Entry date 04/23/91]
9/14/90	34	ORDER by Judge Charles A. Legge dismissing case pending the resolution of the interim appeal from the partial summary judgment granted in favor of defendants & against plaintiffs on 8/17/90, all further proceedings are stayed & the clerk is directed to remove this case from active list (cc: all counsel) (Date Entered 9/19/90) (tl) [Entry date 04/23/91]

DATE	NR.	PROCEEDINGS
4/18/91	35	CLERK'S NOTICE; Status conference 5/10/91 @ 11:00 am (tl) [Entry date 04/23/91]
4/19/91	36	ORDER by Judge Charles A. Legge Case reopened (cc: all counsel) (Date Entered 4/23/91) (tl) [Entry date 04/23/91]
5/1/91	37	STATUS REPORT by plaintiff John Papai, plaintiff Joanna Papai (tl) [Entry date 05/06/91]
5/3/91	38	STATUS REPORT by defendant Harbor Tug & Barge C (tl) [Entry date 05/07/91]
5/10/91	39	MINUTES: (C/R none); Status conference held.; Status conference continued to 7/12/91 @ 11:00am; referring case to Magistrate for settlement (tl) [Entry date 05/16/91]
5/17/91	40	LETTER dated 5/15/91 from Thomas Boyle from John Papai, Joanna Papai re: settlement conference before Judge Zirpoli @ 11:00am on 5/29/91. (tl) [Entry date 05/21/91]
7/3/91	41	STATUS CONFERENCE STATEMENT by defendant Harbor Tug & Barge C (tl) [Entry date 07/05/91]
7/12/91	42	MINUTES: (C/R none); Status conference set for 1/3/92 @ 11:00am (tl) [Entry date 07/16/91]
12/23/91	43	STATUS CONFERENCE STATEMENT by plaintiff (mp) [Entry date 12/26/91]
12/26/91	44	STATUS CONFERENCE STATEMENT by defendant Harbor Tug & Barge (mp) [Entry date 12/27/91]
1/3/92	45	MINUTES: (C/R not reported) Status conference held; Discovery cutoff 5/30/92; Pre-

DATE	NR.	PROCEEDINGS
		trial conference 7/30/92 at 3:00pm; Trial 8/31/92 at 8:00pm and to lift stay (mp) [Entry date 01/08/92]
1/28/92	46	MOTION by defendant Harbor Tug & Barge C to confirm summary adjudication that plaintiff John Papai was not a seaman with Notice set for 2/28/92 at 9:30am (mp) [Entry date 01/30/92]
1/28/92	47	MEMORANDUM by defendant Harbor Tug & Barge C in support of motion to confirm summary adjudication that plaintiff John Papai was not a seaman [46-1] (mp) [Entry date 01/30/92]
1/28/92	—	RECEIVED Order (defendant Harbor Tug & Barge C) re: [46-1] (mp) [Entry date 01/30/92]
2/14/92	48	STATEMENT of undisputed facts by plaintiff John Papai, plaintiff Joanna Papai (as) [Entry date 02/18/92]
2/14/92	49	MEMORANDUM by plaintiff John Papai, plaintiff Joanna Papai in opposition to defendants points and authorities in support of motion to confirm summary adjudication (as) [Entry date 02/18/92]
2/14/92	50	DECLARATION by Thomas J. Boyle on behalf of plaintiff John Papai, plaintiff Joanna Papai (as) [Entry date 02/18/92]
3/19/92	51	REPLY by defendant Harbor Tug & Barge C to response to motion to confirm summary adjudication that plaintiff John Papai was not a seaman [46-1] (mp) [Entry date 03/20/92]
3/19/92	52	DECLARATION by Eric Danoff on behalf of defendant Harbor Tug & Barge C re

DATE	NR.	PROCEEDINGS
		motion to confirm summary adjudication that plaintiff John Papai was not a seaman [46-1] (mp) [Entry date 03/20/92]
3/27/92	53	MINUTES: (C/R Ray Linkerman) granting motion to confirm summary adjudication that plaintiff John Papai was not a seaman [46-1] (mp) [Entry date 04/01/92]
4/1/92	54	DESIGNATION OF EXPERT WITNESS(ES) submitted by plaintiffs (mp) [Entry date 04/06/92]
4/1/92	55	DESIGNATION OF EXPERT WITNESS(ES) submitted by defendant (mp) [Entry date 04/06/92]
4/6/92	56	ORDER by Judge Charles A. Legge granting motion to confirm summary adjudication that plaintiff John Papai was not a seaman [46-1] (Date Entered: 4/8/92) (cc: all counsel) (mp) [Entry date 04/08/92]
6/29/92	57	CLERK'S NOTICE; Pretrial conference reset 8/13/92 at 3:00pm (mp) [Entry date 07/01/92]
7/31/92	58	PRETRIAL STATEMENT by plaintiff John Papai, plaintiff Joanna Papai (mp) [Entry date 08/04/92]
8/3/92	59	PRETRIAL CONFERENCE STATEMENT by defendant Harbor Tug & Barge (mp) [Entry date 08/05/92]
8/13/92	60	TRIAL MINUTES: (C/R Larry White) pretrial conf held 8/13/92; All motions hearing 8/21/92 11:00 a.m.; Trial 8/31/92 1:30 p.m., referring case to Magistrate for settlement (ab) [Entry date 08/17/92]

DATE	NR.	PROCEEDINGS
8/14/92	61	SCHEDULING ORDER by Mag. Judge Phyllis J. Hamilton: stlmnt conf statement due 8/20/92 (cc: all counsel) (ab) [Entry date 08/17/92]
8/17/92	62	MOTION by plaintiff John Papai, plaintiff Joanna Papai for leave to file amended complaint to substitute defendants with Notice set for 8/21/92 at 11:00 am (mcl) [Entry date 08/18/92]
8/17/92	63	MEMORANDUM by plaintiff John Papai, plaintiff Joanna Papai in support of motion for leave to file amended complaint to substitute defendants [62-1] (mcl) [Entry date 08/18/92]
8/17/92	64	DECLARATION by Thomas J. Boyle on behalf of plaintiff John Papai, plaintiff Joanna Papai re motion for leave to file amended complaint to substitute defendants [62-1] (mcl) [Entry date 08/18/92]
8/19/92	65	RESPONSE by defendant to motion for leave to file amended complaint. (pg) [Entry date 08/20/92]
8/19/92	66	DECLARATION by Tana Shipman on behalf of defendant re response [65-1] (pg) [Entry date 08/20/92]
8/19/92	67	DECLARATION by Robert L. Clinton on behalf of defendant re response [65-1] (pg) [Entry date 08/20/92]
8/20/92	68	REPLY MEMORANDUM by plaintiff John Papai, plaintiff Joanna Papai to response to motion for leave to file amended complaint to substitute defendants [62-1] (mcl) [Entry date 08/21/92]

DATE	NR.	PROCEEDINGS
8/21/92	69	MINUTES: (C/R Carl Pline) denying plaintiff's motion for leave to file amended complaint to substitute defendants [62-1] (mcl) [Entry date 08/25/92]
8/25/92	71	MINUTES before Mag. Judge Hamilton 8/24/92: (C/R none); case not settled; Settlement conf (mag) continued to 8/25/92 at 4:00 pm (mcl) [Entry date 09/03/92]
8/25/92	72	MINUTES before Mag. Judge Hamilton: (C/R none) case not settled (mcl) [Entry date 09/03/92]
8/27/92	70	NOTICE and request for allowance of lien by defendant Harbor Tug & Barge C (mcl) [Entry date 09/02/92]
8/31/92	73	TRIAL briefs submitted by plaintiff John Papai, plaintiff Joanna Papai (mcl) [Entry date 09/03/92]
8/31/92	74	DECLARATION by Thomas J. Boyle on behalf of plaintiff John Papai, plaintiff Joanna Papai in opposition to defendant's calling Don Dawson as a witness at trial (mcl) [Entry date 09/03/92]
8/31/92	75	TRIAL briefs submitted by defendant Harbor Tug & Barge C (mcl) [Entry date 09/03/92]
8/31/92	76	TRIAL MINUTES: (C/B Raymond Linkerman) further trial; witnesses: Albert Milani, John Papai (mcl) [Entry Date 09/09/92]
9/1/92	77	TRIAL MINUTES: (C/R Raymond Linkerman) further trial; witnesses: Mr. Low, John Papai (mcl) [Entry date 09/09/92]
9/2/92	80	TRIAL MINUTES: (C/R Ray Linkerman) Trial continued to 9/3/92 @ 1:30 PM; witnesses Scott Dye; Perin Parastaues (lrc) [Entry date 09/10/92]

DATE	NR.	PROCEEDINGS
9/3/92	79	TRIAL MINUTES: (C/R Ray Linkerman); Trial continued to 9/8/92 @ 1:30 PM; witness Joanna Papai; Ann Wilson; Devin Goslin (lrc) [Entry date 09/10/92]
9/8/92	78	MEMORANDUM by plaintiff re: evidentiary issues (lrc) [Entry date 09/10/92]
9/8/92	81	TRIAL MINUTES: (C/R Ray Linkerman) Trial HELD further trial 9/9/92 (ab) [Entry date 09/15/92]
9/9/92	82	TRIAL MINUTES: (C/R Ray Linkerman) Trial HELD further trial 9/10/92 1:30 p.m. (ab) [Entry date 09/15/92]
9/10/92	83	TRIAL MINUTES: (C/R Ray Linkerman) Trial HELD further trial 9/15/92 1:30 p.m. (ab) [Entry date 09/15/92]
9/16/92	84	TRIAL MINUTES: (C/R Ray Linkerman) Trial HELD 9/16/92 continued 9/17/92 1:30 p.m. (ab) [Entry date 09/25/92]
9/17/92	85	TRIAL MINUTES: (C/R Ray Linkerman) Trial concluded 9/17/92 (ab) [Entry date 09/25/92]
9/18/92	86	EXHIBIT AND DESIGNATION OF WITNESS(ES) (ab) [Entry date 09/25/92]
11/2/92	—	RECEIVED Proposed Order (plaintiffs) permitting filing of briefs in excess of twenty-five pages (tmn) [Entry date 11/04/92]
11/4/92	87	ORDER by Judge Charles A. Legge permitting filing of briefs in excess of twenty-five pages (Date Entered: 11/6/92) (cc: all counsel) (tmn) [Entry date 11/06/92]
11/9/92	88	POST TRIAL BRIEF FILED by plaintiffs (tmn) [Entry date 11/13/92]
11/10/92	89	POST-TRIAL BRIEF FILED by defendant (tmn) [Entry date 11/16/92]

DATE	NR.	PROCEEDINGS
11/12/92	90	CLERK'S NOTICE Final arguments of Trial set for 12/15/92 at 2:30 p.m. (tmn) [Entry date 11/17/92]
11/16/92	91	POST-TRIAL BRIEF FILED by defendant (tmn) [Entry date 11/19/92]
11/16/92	—	RECEIVED Post trial reply brief by plaintiffs (tmn) [Entry date 11/19/92]
11/16/92	92	POST TRIAL REPLY BRIEF submitted by plaintiffs (vg) [Entry date 11/20/92]
11/27/92	93	REPORTER'S TRANSCRIPT; Date of proceedings: 8/31/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
11/27/92	94	REPORTER'S TRANSCRIPT; Date of proceedings: 9/1/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
11/27/92	95	REPORTER'S TRANSCRIPT; Date of proceedings: 9/2/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
11/27/92	96	REPORTER'S TRANSCRIPT; Date of proceedings: 9/3/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
11/27/92	97	REPORTER'S TRANSCRIPT; Date of proceedings: 9/8/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
11/27/92	98	REPORTER'S TRANSCRIPT; Date of proceedings: 9/9/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
11/27/92	99	REPORTER'S TRANSCRIPT; Date of proceedings: 9/10/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
11/27/92	100	REPORTER'S TRANSCRIPT; Date of proceedings: 9/16/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]

DATE	NR.	PROCEEDINGS
11/27/92	101	REPORTER'S TRANSCRIPT; Date of proceedings: 9/17/92 (C/R: Raymond Linkerman) (tmn) [Entry date 12/01/92]
12/9/92	102	Amended notice and REQUEST by defendant for allowance of lien (tmn) [Entry date 12/10/92]
12/17/92	103	MINUTES: (C/R Carl Pline) Trial concluded; court finds in favor of defendant (tmn) [Entry date 12/18/92]
12/21/92	—	RECEIVED Judgment submitted by defendant (tmn) [Entry date 12/22/92]
12/28/92	104	JUDGMENT: by Judge Charles A. Legge [20-1] dismissing amended complaint; awarding defendants cost of suit; appeal filing ddl 1/28/93 (Date Entered: 12/29/92) (cc: all counsel) (tmn) [Entry date 12/29/92]
1/5/93	105	BILL OF COSTS in the amount of \$3,577.07 submitted by defendant re judgment [104-2] (tmn) [Entry date 01/07/93]
1/20/93	106	NOTICE OF APPEAL by plaintiff from Dist. Court decision judgment of 12/28/92 [104-2] not paid (tmn) [Entry date 01/21/93]
1/21/93	—	Docket fee notification form and case information sheet to USCA [106-1] (tmn)

DATE	NR.	PROCEEDINGS
1990		
1/12/90	1	COMPLAINT: Issued Summons
1/12/90	2	ORDER setting status conference for 4/13/90 at 11 a.m. CAL
1/12/90	3	Plaintiff's Certificate that the damages sought in the complaint exceed \$150,000 exclusive of any punitive or exemplary award that might be entered, and of interests and costs.
1/12/90	4	Clerk's notice to counsel re: Matter removed from Mandatory Arbitration under Local Rule 500.
2/2/90	5	Plaintiff's proof of service of Summons and Complaint and supporting documents; Order setting status conference EXECUTED as to Harbor Tug & Barge Co. on 1/23/90 at 11:45 a.m. by personal service.
2/12/90	6	Deft's ANSWER TO COMPLAINT.
3/7/90	7	Notice that status conference reset from 4-13-90 to 5-11-90 11:00am. Clerk
4/12/90	8	Defendant's notice of motion & motion for summary judgment, 5-11-90 @ 9:30am.
4/12/90	9	—Points & authorities in support of #8.
4/12/90	10	—Declaration of Eric Danoff in support of #8.
4/12/90	11	—Statement of undisputed facts.
4/12/90		—RECEIVED: proposed order granting summary judgment.
4/12/90	12	Notice from clerk, defendant's motion for summary judgment has been reset to 5-18-90 @ 9:30am.
5/3/90	13	Plaintiffs' status conference statement, 5-18-90 @ 9:30am.

DATE	No.	PROCEEDINGS
1990		
5/4/90	14	Plaintiffs' memo in opposition to motion for summary judgment, 5-18-90 @ 9:30am.
5/4/90	15	—Declaration of Marina V. Secchitano in opposition to motion for summary judgment.
5/10/90	16	Defendant's status conference statement, 5-18-90 @ 11:00am.
5/11/90	17	Defendant's reply brief in support of motion for summary judgment, 5-18-90 @ 11:00am.
5/18/90	18	MINUTES: (c/r Candace Francis) Defendant's motion for summary judgment—granted. Status conference not held. Case continued to 6-8-90 @ 11:00am. Plaintiffs should file an amended complaint by 5-31-90. CAL
5/22/90	19	Plaintiff's further status conference statement, 6-8-90 @ 9:30am.
5/24/90	20	Plaintiff's FIRST AMENDED COMPLAINT, Jury trial demanded.
5/29/90	21	ORDER: Plaintiff's causes of action are dismissed with prejudice. Plaintiffs are granted till 5-31-90 to amend their complaint. Status conference set for 6-8-90. CAL
6/8/90	22	MINUTES: (c/r none) Status conference held. Defendant should move to dismiss or file an answer by 6-30-90 & plaintiff should move for reconsideration by 6-30-90. CAL
6/12/90	23	Plaintiff's certificate of service by counsel of first amended complaint.
6/19/90	24	Defendant's ANSWER TO FIRST AMENDED COMPLAINT.
6/26/90	25	Plaintiffs' motion for reconsideration re seaman status, 7-27-90 @ 9:30am.

DATE	No.	PROCEEDINGS
1990		
	26	—Memo in support of #25.
6/27/90	27	Clerk's notice that plaintiff's motion for reconsideration noticed for 7-27-90 is reset to 8-3-90 @ 9:30am.
6/28/90	28	Defendant's notice of deposition of Marina V. Secchitano, 7-9-90 @ 2:00pm.
7/17/90	29	Defendant's brief in response to plaintiff's motion for reconsideration, 8-3-90 @ 9:30 am.
7/27/90	30	Plaintiff's Reply to defendant's brief in opposition, 8-3-90 @ 9:30am.
8/3/90	31	MINUTES: (c/r Judith Dudeck) Plaintiff's motion for reconsideration—denied. Plaintiff & defendant has requested & the court grants & certifies an interlocutory appeal. CAL
8/10/90		RECEIVED: Plaintiffs' order of denial of reconsideration & statement of grounds for immediate appeal.
8/21/90	32	ORDER: The motion for reconsideration is denied & that plaintiffs' causes of action remain dismissed with prejudice. All proceedings herein be stayed for 10 days from the date of entry of this order. CAL ENTERED: 8-21-90, copies mailed to parties, clerk.
8/20/90	33	Plaintiffs' proof of service re order of denial of motion for reconsideration.
9/14/90	34	ORDER: Pending the resolution of the interim appeal from the partial summary judgment granted in favor of defendants & against plaintiffs on 8-17-90, all further pro-

DATE	No.	PROCEEDINGS
1990		
		ceedings in this action are stayed & the clerk is directed to remove this case from the activist list. CAL ENTERED: 9-19-90, copies mailed to parties, clerk.
1991		
4/18/91	35	Clerk's notice setting status conference for 5/10/91 @ 11:00am.
4/19/91	36	ORDER: This action is to be restored to the active civil list. CAL

[Filed Jan. 12, 1990]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C 90 0111 CAL

JOHN PAPAI, JOANNA PAPAI,
Plaintiffs,

v.

HARBOR TUG AND BARGE COMPANY,
Defendants.

**COMPLAINT FOR PERSONAL INJURIES AND
DAMAGES UNDER THE JONES ACT AND
THE GENERAL MARITIME LAW;
LOSS OF CONSORTIUM**

DEMAND FOR JURY TRIAL
(Local Rule 200-4)

**CLAIMS UNDER THE JONES ACT AND THE
GENERAL MARITIME LAW**

1. *Jurisdiction:* This action arises under the Jones Act, 46 USC §§ 688 *et. seq.*, and the general maritime law, as hereinafter more fully appears.

2. Plaintiff, JOHN PAPAI is a seaman and proceeds without prepaying fees of costs, or furnishing security therefor, under 28 USC § 1619.

3. At all relevant times, defendants, and each of them, owned, managed, operated and controlled the vessel, M/V POINT BARRON, (hereinafter referred to as the vessel) and used the vessel in navigation and commerce in navigation waters.

4. At all relevant times, plaintiff JOHN PAPAI was employed by defendants as a deck hand of the vessel, and was in service of the vessel.

5. On or about March 13, 1989, while acting within the scope of his maritime employment, plaintiff JOHN PAPAI was caused to suffer serious personal injuries as the direct proximate result of the negligence of defendants, defendants' employees, agents and representatives, and the unseaworthiness of the vessel, in that defendants and the vessel:

(a) failed to furnish plaintiff JOHN PAPAI with a reasonably safe place to work;

(b) failed to furnish plaintiff JOHN PAPAI with reasonably safe, suitable and/or proper equipment to perform ordered tasks;

(c) failed to provide plaintiff JOHN PAPAI with efficient able-bodied help so as to safely perform ordered tasks;

(d) placed plaintiff JOHN PAPAI in an unsafe position under the conditions existing at the time and place of the aforementioned injury;

(e) failed to adequately inspect and ensure the proper operation of the vessel's men and machinery so as to obviate the risk of injury to their employees;

(f) failed to properly maintain the vessel's equipment in good working order so as to obviate the risk of injury to their employees;

(g) failed to instruct plaintiff JOHN PAPAI as to the safe and proper manner in which to perform his tasks;

(h) failed to provide timely and adequate medical care, treatment and maintenance and cure;

(i) failed to operate the vessel in a safe manner, which did render the vessel's attendant gear, tackle and appliances unseaworthy;

(j) failed to provide plaintiff JOHN PAPAI with a safe place to work, a safe vessel and competent crew, which did render the vessel's attendant gear, tackle and appliances unseaworthy;

(k) had the knowledge and ability to control and correct said unseaworthy conditions prior to the occurrence of the injury; and

(l) otherwise breached their duties owed to plaintiff JOHN PAPAI under the circumstances.

6. As a direct and proximate result of the foregoing, plaintiff JOHN PAPAI has suffered and will continue to suffer general damages; wage loss; hospital and medical expenses; loss of earning capacity; and inability to lead a normal life.

7. At all relevant times, because of plaintiff JOHN PAPAI's service upon the said vessel, defendants had and continue to have a duty to provide plaintiff with the expenses of his maintenance and cure from the time of his disability to maximum medical care.

8. At all relevant times defendant(s) was/were guilty of malice, fraud and oppression and plaintiff JOHN PAPAI should recover, in addition to actual damages, damages to make an example of and punish defendant(s).

CLAIMS FOR LOSS OF CONSORTIUM

9. Plaintiff JOHN PAPAI hereby refers to and incorporates herein by this reference each and every allegation contained in paragraphs one through eight of this complaint as though fully set forth at length.

10. At all material times herein, and at present, the plaintiffs JOHN PAPAI and JOANNA PAPAI were husband and wife.

11. Under the general maritime law, incident to plaintiff JOHN PAPAI's claims for damages under the Jones Act and the doctrine of unseaworthiness the plaintiff JOANNA PAPAI is likewise entitled and empowered to recover loss of cure, discomfort and society, support and enjoyment of her husband, proximately caused by defendants' negligence and the unseaworthiness of their vessel.

12. In her own right, plaintiff JOANNA PAPAI, seeks damages against defendants, and each of them, incident to recovery by plaintiff of a sum in excess of \$500,000.00 which sum represents a fair and reasonable estimate of the monetary value of the loss of care, comfort, society and support and enjoyment which JOANNA PAPAI has endured as a result of the injury to her husband JOHN PAPAI.

WHEREFORE, plaintiff prays judgment against defendants and each of them as follows:

1. For general damages in a sum according to proof and in excess of \$1,000,000.00;

2. For medical expenses, past and future, according to proof;

3. For loss of earnings, past and future, according to proof;

4. For maintenance and cure benefits according to proof;

5. For interest at the rate prescribed by law upon all sums owing as maintenance and cure and for reasonable attorney's fees on said amounts;

6. For damages for loss of consortium on behalf of plaintiff, JOANNA PAPAI, in a sum in excess of \$500,000.00;

7. For costs of suit; and,

8. For such other and further relief as the court may deem just and proper.

DATED:

SULLIVAN, JOHNSON, BOYLE & NURIK

/s/ Thomas J. Boyle
THOMAS J. BOYLE
Attorneys for Plaintiff
JOHN PAPAI
JOANNA PAPAI

JURY TRIAL DEMANDED

Plaintiffs hereby demand trial by jury.

SULLIVAN, JOHNSON, BOYLE & NURIK

/s/ Thomas J. Boyle
THOMAS J. BOYLE
Attorneys for Plaintiff
JOHN PAPAI
JOANNA PAPAI

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

Date: May 11, 1990

Time: 9:30 a.m.

Courtroom: Judge Legge

DECLARATION OF ERIC DANOFF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Eric Danoff, am an attorney with Graham & James, counsel for defendant HARBOR TUG AND BARGE COMPANY. My business address is One Maritime Plaza, Suite 300, San Francisco, California. On March 7, 1990, I took the deposition of plaintiff JOHN PAPAI. Attached hereto are copies of pages from the transcript of that deposition.

Executed at San Francisco, California, on April 12, 1990.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 12, 1990.

GRAHAM & JAMES

By: /s/ Eric Danoff
ERIC DANOFF
Attorney for Defendant
Harbor Tug and Barge Company

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

DEPOSITION OF JOHN D. PAPAI

* * * *

March 7, 1990

* * * *

[10] Q. After 1968 when you finished with San Francisco State, did you then begin working?

A. Yes.

Q. What was your first job?

A. I believe it was the post office.

Q. Was this in 1968?

A. I don't really remember.

Q. Would it have been '68 or '69?

A. Either one or the other.

Q. What—how—strike that. How long did you work for the post office?

A. A year.

Q. What was your job there?

A. Mail clerk.

Q. Was that here in San Francisco?

A. Yes.

Q. What was your next job?

A. Hum. I believe it was Health, Education and Welfare.

Q. Is that the Department of Health, Education and Welfare?

A. Yes.

Q. So you worked for the Federal Government?

A. Yes.

Q. What year did you begin that work?

A. I believe—let me see. I believe it was [11] '69.

Q. How long did you work for DHEW?

A. Three years.

Q. Until about 1972?

A. Yes.

Q. What was your job during those three years?

A. Mail clerk.

Q. Was that here in San Francisco?

A. Yes.

Q. What did you do as a mail clerk?

A. Just sorted mail, wrap packages and distribute mail.

Q. After working for the Department of Health, Education and Welfare, what was your next job?

A. Part owner of a bar.

Q. Did that begin in 1972?

A. Yes.

Q. What bar was that?

A. Called Paradise Cafe.

Q. In what city?

A. San Francisco.

Q. How long—strike that.

A. In addition to being an owner, did you work in the bar?

A. Yes.

Q. Was that your full-time job, working in the [12] bar?

A. Yes.

Q. You had no other outside employment.

A. No.

Q. How long did you work in the bar?

A. That particular bar, five years.

Q. So that would be until about 1977?

A. That's correct.

Q. What work did you do in the bar?

A. Managing, bartending.

Q. You did both?

A. Uh-huh.

Q. Is your answer yes?

A. Yes.

Q. Off the record.

(Discussion off the record.)

MR. DANOFF: Back on the record.

Q. I understand what a bartender does, but what did the manager do; did that mean keeping books and hiring people or what?

A. Hiring people, firing people, inventory, daily banks.

Q. I'm sorry.

A. Daily bank is, we have to have cash for the bank.

* * * *

[15] Q. Was there a formal bankruptcy proceeding of any sort?

A. No. The Federal Government got us for back taxes.

Q. So you just gave them the bar and that was that?

A. Yes.

Q. What was your next job then after that?

A. Bartender again.

Q. Beginning in 1977?

A. No. It was more like '79 or '78.

Q. Did you take some significant time off between the time the Paradise Cafe closed down—

A. About—

Q. —and the time you went back to work?

A. About a year.

Q. And what did you do generally during that year?

A. Just odd jobs.

Q. In the San Francisco area?

A. Yes.

Q. So you had no full-time employment?

A. No.

Q. Then you became a bartender, I believe you said, in 1978 or '79?

A. I believe '79.

[16] Q. And where did you begin working as a bartender?

A. Coffee Gallery.

Q. Was that Coffee Gallery or Galleria?

A. Gallery.

Q. G-a-l-l-e-r-y?

A. Correct.

Q. Where is that; San Francisco?

A. Yes.

Q. How long did you work at the Coffee Gallery?

A. About a year.

Q. Were you strictly a bartender there?

A. Yes.

Q. Did you do any management of any sort?

A. I did inventory.

Q. Did you do any other management function there?

A. No.

Q. Were you an owner of that?

A. No.

Q. Were you a member of a bartenders' union?

A. No.

Q. Then what was your next job?

A. Bartender again at the Fresno Hotel Saloon.

Q. This is beginning in about 1980 then?

A. Yes.

[17] Q. Until when?

A. Oh, boy. About either '83 or '84.

Q. Would you repeat the name of the bar?

A. Fresno Hotel Saloon.

Q. Was that in San Francisco?

A. Yes.

Q. What was your job there?

A. Bartender.

Q. Were you an owner at all?

A. No.

Q. Did you have any management function at all?

A. No.

- Q. Not even inventory?
- A. No.
- Q. Strictly bartender?
- A. Yes.
- Q. Were you a member of a union?
- A. No.
- Q. Have you been a member of a bartenders' union?
- A. Yes.
- Q. Which union was that?
- A. Hotel Employees—Hotel and Restaurant Employees, Local 2, the one here in the city.
- Q. When did you join that?
- A. It was—I believe that was 1986.
- Q. Okay. So we haven't got there yet in [18] sequence.
- A. No. Correct.
- Q. Okay. After you left the Fresno Hotel Saloon, what was your next job?
- A. Red and White Catering.
- Q. What year did you begin working for Red and White Catering?
- A. I believe it was 1983?
- Q. You said earlier you left the Fresno Hotel Saloon in 1983 or 1984. Does that help you remember when you joined Red and White Catering?
- A. Must have been '83 then.
- Q. How long did you work for Red and White Catering?
- A. I believe it was two years.
- Q. Until 1985.
- A. Yes. Oh, wait a minute. They went out of business in—was it '84? Must have been '85; I'm not sure.
- Q. By the way, do you have any records of your employment history so we could get these dates more precisely?
- A. Not with me, no.
- Q. Do you have some at home?
- A. Yes.

- Q. What did you do for Red and White Catering?
- [19] A. Catering and bartending.
- Q. Was Red and White—who owned or operated Red and White Catering?
- A. Mario Garcia.
- Q. Were you an owner at all of Red and White Catering?
- A. No.
- Q. You said you did bartending and catering—
- A. Correct.
- Q. —work.
- What kind of bartending did you do? Was this—I don't know what this company does.
- A. Sometimes private parties and sometimes just regular bay runs.
- Q. So this is on board ship?
- A. Yes.
- Q. Were—was all of your work for Red and White Catering aboard ship—
- A. Yes.
- Q. —rather than on the shore?
- A. Correct.
- Q. Was this catering on the Red and White fleet?
- A. Yes.
- Q. And was all your work on the San Francisco Bay?
- A. Sometimes up in the delta.
- [20] Q. Okay. But not outside the Golden Gate?
- A. No.
- Q. What kind of boats did you work on—first of all, did you work on one boat or more than one?
- A. All the boats.
- Q. How many were there?
- A. I believe they have eight.
- Q. Had then or have now? What I'm asking is what they had then. Let's go off the record.

(Discussion off the record.)

(Record read back by the reporter.)

THE WITNESS: Eight, I believe.

MR. DANOFF: Q. What kind of boats were these?

A. Ferry boats.

Q. What ports did the ferry boats go at while you worked aboard.

A. You mean—

Q. They called it San Francisco or where else?

A. San Francisco for me.

Q. Were they all party boats, or were they actually real ferry—

A. They did both.

Q. And you worked on them in both runs—

A. And parties.

Q. You mentioned that Mario Garcia, I thought you [21] said, owned Red and White Catering. Did I understand you correctly?

A. Yes.

Q. Was Red and White Catering in your understanding a separate company from the company that owned the boats?

A. Yes.

Q. So your employer was the company Red and White Catering, not the boat owner, as far as you understood.

A. That's correct.

Q. Were you a member of a union during that period?

A. Yes.

Q. Which union?

A. Inland Boatman's Union.

Q. I call that the I.B.U.; do you understand that to be the Inland Boatman's Union?

A. Yes.

Q. Have you been a member of the Inland Boatman's Union since?

A. I still am.

Q. Have you always been a member since the first time you joined?

A. Yes.

Q. There was no laps of membership?

A. I don't understand.

* * * *

[24] A. Only Red and White Catering.

Q. What did you do for Red and White Catering exactly?

A. Bartending and catering.

Q. What does catering mean; what did you do as a caterer?

A. Stocked the boat with food and tables, set it up, present the food, serve the food, then break it down and take it off the boat.

Q. So part of the job was set up—

A. Yes.

Q. —of the tables and the food?

A. Yes.

Q. Part of it was serving the food?

A. Yes.

Q. Part of it was cleanup afterward?

A. Yes.

Q. Did you cook during this period?

A. Yes.

Q. Did you also do other kinds of food preparation, slicing, dicing—

A. Yes.

Q. —and all that?

A. Yes.

Q. Did you cook hot meals?

A. Not cook, just warmed it up.

[25] Q. Did you ever join a union for cooks?

A. No.

Q. At any time?

A. No.

Q. Have you ever been a member of any union other than the I.B.E.—or the I.B.U. and the—I forget the name of the other bartenders' union; I'm not sure. What was the name of that other union?

A. Hotel—what was it? Hotel and Restaurant.

Q. And you said you joined Local 2?

A. That's Local 2, yeah.

Q. By the way, is there a local for the I.B.U.?

A. No.

Q. Did you join the Hotel and Restaurant Workers' Union while you were working for Red and White Catering?

A. No.

Q. After you left Red and White Catering?

A. That's right.

Q. Have you been a member of any other union other than those two?

A. No.

Q. Who was your immediate superior at Red and White Catering; who gave you your instructions, and to whom did you report about your work?

A. Elizabeth.

Q. Do you remember her last name?

[26] A. No.

Q. What was her title?

A. Supervisor.

Q. And she also was an employee of—as far as you understood it—Red and White Catering?

A. That's right.

Q. So Mr. Garcia was not your immediate supervisor?

A. No.

Q. Did you take any instructions from the ship's captain or the boat's captain or crew while you were catering?

A. Not normally, no.

Q. So if they had a problem, they would talk to Elizabeth or somebody else above Elizabeth in the hierarchy?

A. Oh, sure.

Q. Have you explained then everything you've done for Red and White Catering as far as kinds of work?

A. That and bartending.

Q. Was there any management function as far as you understood it to your job at Red and White Catering?

A. No.

Q. What was your job after leaving Red and White Catering?

A. Went down to the union hall.

Q. This is—

[27] A. I.B.U.

Q. Was this beginning in 1987?

A. Yes.

Q. Have you had any full-time employment since leaving Red and White Catering?

A. Just out of the hall, out of I.B.U. hall.

Q. When you—strike that

Where is the I.B.U. hall?

A. 501 Army Street.

Q. San Francisco?

A. Yes.

Q. You say you have no permanent employment other than out of the hall. My question is, have you worked for any one company, whether you got the job through the hall or not, for, say, two months or more since 1987. Beginning of '87?

A. I had 40 days of Golden Gate.

(Discussion off the record.)

MR. BOYLE: That's all. She just wanted you to repeat the words you said, not an explanation.

MR. DANOFF: Q. Golden Gate is the Golden Gate Transit District?

A. That's correct.

Q. What did you do for the Golden Gate Bridge or Transit District?

A. During the 40 days?

[28] Q. Yes.

A. Maintenance on the docking area at the San Francisco ferry terminal.

Q. Was this in 1988?

A. Yes.

Q. What do you mean by maintenance; is that painting or cleanup or what?

A. Chipping. Chipping and painting.

Q. Was this job on the dock itself rather than on boats?

A. Yes.

Q. So you did not work for the Golden Gate Bridge District on boats, correct?

A. During that Friday period, that's correct.

Q. Since, say, January 1st, 1987, and other than the Golden Gate Bridge District work, have you worked for any other employer for more than a month?

A. No.

Q. So your jobs have been all shorter than one month other than one job?

A. That's correct.

Q. What kinds of jobs have you had out of the I.B.U. hall?

A. Deck hand and maintenance.

Q. When you use the term "deck hand," what do you mean by that?

[29] A. Docking boats, throwing lines.

Q. You mean you stand on the dock and throw the lines to the boat, or you stand on the boat and throw the lines to the dock?

A. Stand on the boat and jump off the boat and put the line on the dock.

Q. And by maintenance, what do you mean?

A. More or less chipping rust and painting.

Q. Now to get a job out of the I.B.U. hall, do you have to appear there in person?

A. Yes.

Q. Why don't you explain to me the sequence of how you get a job out of the I.B.U. hall.

A. Okay. Well, every three months—I have a "C" card, okay? Every three months, everybody goes and

there's a whole block of "C" cards. And every three months, you have to re-throw your card in, and you go to the bottom of the list. So towards the bottom of the three-month period, you're pretty high on the list of "C" cards. And when they have a job on the board, you throw your card in, and if your number is highest, you get that job.

Q. Now if I understand you correctly, if someone with an "A" card or "B" card wanted the job, they would get it?

A. That's correct.

* * * *

[32] Q. And they use the I.B.U.?

A. Yes.

Q. And you had some of those jobs?

A. Uh-huh.

Q. And your answer is yes?

A. Yes.

Q. And those are longshore jobs?

A. Yes.

Q. What kind of work did you do as a longshoreman?

A. What they call lashing, sometimes fish meal.

Q. What does fish meal involve?

A. Shoveling fish meal, dried fish.

Q. Okay. Anything else?

A. Steel working.

Q. Discharging or loading steel?

A. Discharging.

Q. Were you working on the ships, or were you working on the shore?

A. Mostly on the ships; sometimes on the shore.

Q. Did you work for any particular stevedore company?

A. Not that I know of—I don't know the name, because all the checks came from the same company.

Q. Did the checks come from the Pacific Maritime Association?

[33] A. That's it.

Q. Okay. But was there a particular stevedore company who was involved in the work you were doing as a longshoreman?

A. Yeah, there were different companies, yes, but they all seemed to be under Pacific Maritime.

Q. But you didn't work for one particular stevedore company?

A. No, I don't think so. No.

Q. Okay. So if I understood you correctly, you did deckhand and maintenance work on boats?

A. Uh-huh.

Q. This is from January 1987 until now.

A. Correct.

Q. You did maintenance work on shore for the Golden Gate Bridge District?

A. Yes.

Q. You did longshoring, some on shore and some on ships, for companies affiliated with the Pacific Maritime Association, right?

A. That's correct.

Q. Did you do any other kind of employment beginning January 1987 until now?

A. Yes. I was with that Local 2 for three or four months.

Q. Local 2 is the Hotel and Restaurant Workers' [34] Union?

A. Yes.

Q. What work did you do through Local 2?

A. Bartending.

Q. On shore side?

A. Yes.

Q. For what entity?

A. Through the union.

Q. Does that mean you worked for various—

A. Yes.

Q. —different places?

A. Yes.

Q. How long did you do that?

A. About three months.

Q. What year was that?

A. I believe it was '87.

Q. But you worked strictly as a bartender?

A. Yes.

Q. If—strike that.

Do you have any records anywhere that would allow you to list for us the jobs you had through the I.B.U. from January 1987 on?

A. Payroll stubs.

Q. You do have those payroll stubs at home?

A. I believe so, yeah.

* * * *

[37] A. Are you talking about being a deckhand or a bartender?

Q. A bartender.

MR. BOYLE: You were asking from January 1, '87 on.

MR. DANOFF: Strike that. I stand corrected.

Q. From the period January 1987 on, did you ever work as a bartender aboard a boat?

A. No.

Q. So you were strictly a deckhand and a maintenance worker?

A. That's correct.

Q. Was any of that work at night?

A. Yes.

Q. You used the word relief a couple of times; would you explain what a relief job is?

A. It's somebody who has a regular job; they have to take a day off, I expect, or is sick; you're the one that fills in for them.

Q. So you would relieve permanent deckhands or permanent maintenance hands on the boat for—

A. On some occasions.

Q. Were most of your jobs out of the I.B.U. hall for one day?

A. Sometimes they were a couple days; sometimes [38] three days, mostly one day.

Q. On those jobs that were more than one day, was it just by chance that you went back the second day and got the same boat, or were you actually given a two- or three-day job?

A. Sometimes a two- or three-day job.

Q. But normally speaking, it was a one-day job?

A. Yes.

Q. The work you did as a deckhand and maintenance man, was some of that work done while the boats were moving on the water and some done while it was tied to the dock?

A. The maintenance was while it was tied to the dock, and deckhand was when it was moving.

Q. I couldn't tell from the payroll stubs; I don't think they say; can you tell me generally speaking what percentage of your work since January '87 has been deckhand work and what percentage of your work out of the I.B.U. hall has been maintenance work?

A. I'd say 70 percent deckhand.

Q. Seven zero?

A. 70 percent deckhand.

Q. And was most of that work done while the boats were moving on the water?

A. Yes.

* * * *

[41] Q. —the three days immediately preceding the accident?

A. That's correct.

Q. Was your work on the Point Barrow before the accident date maintenance work—

A. Yes.

Q. —rather than deckhand work?

A. That's true.

Q. Did you say that you worked on that boat three or four times you think?

A. Yes.

Q. And it was all maintenance work?

A. That's right.

Q. In other words, the boat was always tied to the dock—

A. Yes.

Q. —when you worked on it?

A. Yes.

Q. Have you been aboard the Point Barrow other than to do that maintenance work?

A. No.

Q. When you worked on the Point Barrow, on all the occasions you worked on it, did you always sleep ashore?

A. Yes.

Q. And you got all those jobs out of the union [42] hall.

A. Yes.

Q. The job that you got for the March 13, 1989 work, was that a single-day job, or was that going to be more than one day?

A. I believe it was one day.

Q. And then so you were planning to go back to the union hall the next day to see what else was available?

A. Yes.

Q. Did you work at all on March 12, 1989, the day before the accident?

A. No.

Q. Did you work on March 11th?

A. No.

Q. How would you decide what days you were going to go into the union hall to get a job?

A. I went everyday.

Q. So on the two days before March 13, you went in, but you were not high enough on the list?

A. Well, the 12th was Sunday, and the 11th was Saturday, so the hall is closed.

Q. Okay. Let's go back to the Friday. Did you work on the Friday?

A. No.

* * * *

[50] Q. Is it your understanding that the employer, prospective employer, call the union hall, says, I need three men to do maintenance work, and then the union gets three men and sends them out?

A. Yes.

Q. And to show that you're one of the three men the union has sent out, you give the employer a dispatch slip?

A. Not really.

Q. Well, what paper do you present so that they know you're legitimately sent out by the union?

A. Usually they have your name already, so—

Q. Do you keep the dispatch slip then?

A. (Witness shakes head negatively.)

Q. But you're given it by the union to show that you're one of the three men selected?

A. Yes.

Q. Now at the end of the day, what piece of paper is generated to show that you worked for that day?

A. Usually logged on the captain's report.

Q. And then does he give you something?

A. No.

Q. How do you get paid normally?

A. You be sure your name is on the log and the hours are correct. At the end of the week, or whatever the time period is, they issue you the checks.

[51] Q. They send it to you in the mail?

A. No, usually you go down to get it.

Q. At the company or the union hall?

A. The company.

Q. Now in the case of the Point Barrow, when you worked on it as a maintenance worker, was there a captain aboard the ship?

A. That day you mean?

Q. Yes.

A. No.

Q. So in that case, there's no log, right?

A. True.

Q. So how do you, in that case, in the case of the Point Barrow in the days before your accident when you worked on that tug, how did you verify you worked and got paid?

A. I reported to Don Dawson.

Q. Don Dawson in your understanding was who?

A. Port captain.

Q. He was a shoreside guy?

A. Yes. I believe so.

Q. Where was his office?

A. On the premises.

Q. The premises are what, by the way?

A. The home dock in Alameda.

Q. And that's—was that where the Point Barrow [52] was tied up every time you worked on it as a maintenance worker?

A. Yes.

Q. And there was an office shoreside there on the dock?

A. Yes.

Q. And Mr. Dawson was there in each case?

A. Yes.

Q. So at the end of the day, except on the day when you were injured, what would you do to verify to Mr. Dawson that, yes, you'd worked that day?

A. He knew we were there. And at the end of the day, we reported to him saying we were done.

Q. Did you get some sort of receipt or time sheet?

A. Yes.

Q. Did you keep those?

A. I believe so.

Q. So you think you have those at home?

A. Yes.

Q. What is the piece of paper called?

A. I don't know.

Q. What generally did it have on it?

A. The time, the boat you worked on and a signature.

* * * *

[57] Q. By that I'll include not a formal interview. But somebody asking you what happened, and what time was it, and where were you, what were you doing, those kinds of questions; have you ever answered those kind of questions about this accident?

A. Other than Mr. Boyle, No.

Q. Approximately how many companies have you worked for sailing out of—or strike that—getting jobs out of the I.B.U. hall since January '87?

A. Red and White, Golden Gate, Harbor Tug, and the longshore.

Q. But the longshore jobs, putting those aside, and putting Golden Gate Bridge District job aside, because I though you said you were shoreside during that job.

A. Just for that one particular job.

Q. You've also worked on their farries?

A. At the decking, yes.

Q. So the companies you worked for basically were Red and White, Harbor Tug and Barge and the Golden Gate Bridge District.

A. That's correct.

Q. When you worked on the Point Barrow on occasions other than the day you had your accident, you said you were doing maintenance work, but what kind of maintenance work was it?

[58] A. Chipping rust and painting.

Q. So that's all the work you've done on the Point Barrow basically is chipping rust and painting.

A. That's correct.

Q. Have you ever filed a lawsuit before?

A. No.

Q. Have you ever been sued in a lawsuit?

A. No.

Q. Have you ever filed a claim for a personal injury before?

A. No.

Q. Okay. Let's go off the record.)

(Discussion off the record.)

MR. DANOFF: Q. After the injury that you had on the Point Barrow in March 1989, you went to the Merritt-Peralta Hospital. And do you remember the name of the doctor you saw?

A. No, I don't.

Q. Did you only see that doctor that one time, or have you gone back to that doctor?

A. Just that one time.

Q. What did that doctor say to you about your injury?

A. She really didn't have a diagnosis that I remember. But she wanted me to come back, I think, in a couple, three days.

* * * *

[82] Q. After your operation, at what point did your knee stop hurting when you were just sitting or not active; was it a week later, a month later, or what?

A. A couple months, I guess.

Q. After the—strike that.

At the time of the accident was there anybody else on the boat.

A. On the boat, no.

Q. Was there anybody shoreside near the boat?

A. Not that I saw.

Q. Where was Mr. Lowe, if you know?

A. He was on the other side of the dock.

Q. On a different boat?

A. Yes.

Q. So you were by yourself on the boat at the time of the accident?

A. Yes.

Q. By yourself on the Point Barrow?

A. Yes.

Q. Do you know or have any reason to believe that anyone saw you fall?

A. I don't know.

Q. Did Mr. Lowe say he saw you fall?

A. No.

* * * *

[84] Q. Was there anyone else working on that other boat?

A. With Mr. Lowe?

Q. Yes.

A. Yes.

Q. What was the name of the other boat?

A. Sea King.

Q. Did you talk to any of those other people besides Mr. Lowe who were on the Sea King?

A. No.

Q. So you don't know whether they saw your accident or not.

A. That's correct.

Q. How was the Point Barrow docked at the time of your accident?

A. Portside to the dock.

Q. And you were working at the front of the house, correct?

A. Yes.

Q. How was the Sea King docked?

A. I believe portside to the dock on the other side.

* * * *

[90] Q. How old is your wife?

A. 45.

Q. Had she ever worked for a living?

A. Yes.

Q. And what was her occupation?

A. The most recent?

Q. Yes.

A. Waitress.

Q. When was the last time she worked as a waitress?

A. Before the baby was born, so I suspect it was '86.

Q. Had she worked in any other occupations other than being a waitress?

A. Post office, nailing redwood planter boxes, selling crystal. That's all I can really remember.

Q. Okay. Now let's go ahead and take our break.

(Brief recess taken.)

MR. DANOFF: Q. I believe you testified that the day of the accident, March 13, 1989, that morning you got the job out of the union hall, right?

A. I believe it was off standby.

Q. What is standby?

A. Well, if there's nothing at the hall for that [91] particular time, you get on the standby list, which means if a company needs you, either Golden Gate or Red and White or Harbor Tug needs you, say, for a morning shift or a later shift that day, they can give you a call.

Q. Is it your recollection that the accident was on a Monday?

A. It was on a Monday.

Q. Then did you go down to the union hall that morning?

A. No.

Q. Did you call down to the union hall?

A. No.

Q. How did you know there were no jobs available directly out of the hall?

A. I didn't because I was on the job.

Q. Did you get the job for the Point Barrow on the preceding Friday?

A. No, it was—somebody from Harbor Tug and Barge called. I suspect it was Sunday night.

Q. That's not—I confess to being confused here.

A. Okay.

Q. You say there's a standby list.

A. Yes.

Q. And is that a list of people who are I.B.U. members?

[92] A. That's correct.

Q. And what is your understanding about how someone like Harbor Tug and Barge gets a worker off the standby list?

A. They call them up on the telephone.

Q. How many people are on the standby list; is the whole union on the standby list?

A. No. Some of the members go out on jobs, and then the other ones, you get on the standby list.

Q. Okay. So that those people who got a job on Friday were not on the standby list?

A. Yes, they're eligible as well.

Q. Is the hall closed on Saturday and Sunday?

A. That's correct.

Q. I thought you said that the only people on the standby list are the people who have not gotten jobs from the hall.

A. I was mistaken then.

MR. BOYLE: No. You asked if the entire I.B.U. was on the standby list. And he said there are people that have jobs that aren't on the standby list. Not the entire I.B.U. are; they are people who have steady jobs, all kinds of variation.

MR. DANOFF: Q. Let's talk about people who don't have steady jobs.

I take it there are people who have steady [93] jobs and they go there everyday.

A. Yes.

Q. The other people are called what?

MR. BOYLE: Casuals.

MR. DANOFF: Q. You were a casual?

A. That's correct.

Q. Now let's limit our questions to the casuals. Are all the casuals on the standby list?

A. Well, there's a standby list for each company, so some choose to go to one company over another.

Q. What standby list were you on?

A. I was on Harbor Tug, I believe.

Q. Were you also on the Golden Gate Bridge standby list?

A. No.

Q. Were you on any other standby list?

A. I may have been on Red and White; they could have called me as well.

Q. When somebody calls from the standby list, the company just calls directly?

A. To the house.

Q. Do you recollect for sure that's how you were hired on March 13th?

A. Yes.

Q. Do you know who called you?

A. No.

[94] Q. Do you remember what they said when they called you?

A. We have a job for you.

Q. Anything else?

A. Just information where to go and what time.

Q. And what time did you go to the job on Monday?

A. I believe it was 8:00 o'clock.

Q. 8:00 a.m.?

A. A.m., yes.

Q. And where did you go?

A. Home Dock, Alameda.

Q. That's the same place you worked before, I take it, when working on the Point Barrow?

A. Yes.

Q. Had you worked at all that Friday, Saturday or Sunday preceding?

A. No.

Q. When was the next previous job that you had?

A. I believe the 4th of March, I believe.

Q. Approximately nine days before the accident?

A. I believe so. I'm not absolutely certain.

Q. Do you remember what that job was on the 4th?

A. It was a maintenance job. I don't remember exactly what boat it was on.

Q. You don't remember which boat or which company?

[95] A. Actually, you can look it up yourself.

MR. BOYLE: We can look it up on here.

THE WITNESS: It will give you all the particulars, because they list by boat.

MR. DANOFF: Q. Okay.

A. It would be the last page, I believe.

Q. Did you know that your job would be a maintenance job on the 13th when you went there?

A. Yes.

Q. Rather than a deckhand job.

A. Yes.

Q. You knew the boat would be tied up.

A. Yeah, I guess.

Q. And you understood you were going to do chipping and painting?

A. I believe it was—yes.

Q. Now when you arrived at the home dock, did you meet with anyone, or did anyone give you instructions about what to do?

A. Don Dawson.

Q. Had you known Don Dawson before?

A. Just working with him in maintenance at home dock?

Q. Did you know him outside of a work context at all?

A. No.

[96] Q. Did you know Mr. Lowe outside of a work context at all?

A. No.

Q. You mentioned you said he was your friend; did you socialize with him at all?

A. No.

MR. BOYLE: It says Sea Fox on here for the 3rd of March.

THE WITNESS: That should be correct.

MR. DANOFF: Q. Does that—

A. Make sense?

Q. —conform to your recollection?

A. Yes.

Q. All right. When you got to the home docks and talked to Mr. Dawson, what did he say?

A. We were going to paint. We were going to be painting.

Q. You used the term "we," was there anyone else?

A. I was with Edwin Lowe.

Q. So the two of you started together out on the same boat?

A. That's correct.

Q. Did Mr. Lowe start work at the same time you did, about 8:00 o'clock?

A. Yes.

Q. When—did Mr. Dawson say anything else?

[97] A. Just to start painting.

Q. Did he tell you where to paint?

A. Yes, we had to paint the red lead primer paint. We had to paint over that with white paint.

Q. Was there any particular part of the ship?

A. Pretty much all over.

Q. Did you and Mr. Lowe then begin painting?

A. Yes.

Q. And approximately what time did you actually begin painting?

A. Well, we had to get the paint, I suppose. I really can't remember. I wouldn't think it was more than 20 minutes.

Q. So now we're at 8:20 in the morning?

A. I believe so.

Q. How long did you and Mr. Lowe paint in the morning?

A. We—I suspect about 11:30 or noon.

Q. Did you then take a lunch break?

A. I did. Mr. Lowe had been called to work on the Sea King.

Q. When was he called to work on the Sea King?

A. Before noon.

Q. Was there some period before noon where you were painting by yourself on the Point Barrow?

A. I believe I painted a little bit more and then [98] decided to take lunch.

Q. So the sequence was, you and Mr. Lowe began painting together on the Point Barrow, then the late morning he went off to the Sea King, and you painted alone for a short period and then took a lunch break.

A. To the best of my recollection.

Q. How long was your lunch break?

A. Half an hour.

Q. So did you then go back and start painting again in the afternoon?

A. Yes.

Q. This time you were by yourself?

A. Yes.

Q. And you continued to paint by yourself until the time of the accident?

A. That's correct.

Q. When would the workday have ended had you not had an accident?

A. I believe 4:30.

Q. Was anybody—did you—strike that.

Did you speak with Mr. Dawson at any time after the original discussion with him at about 8:00 in the morning?

A. I believe he came by around 10:00 to see how we were doing. And he came back later. That's when he asked Edwin if he wanted to go on the Sea King.

[99] Q. So Mr. Dawson came by at about 10:00?

A. I don't really remember, actually. I think I remember him coming just to see the progress of the work.

Q. Don't guess. If you remember, say so; if you don't remember—

A. I don't remember.

Q. You do remember him coming, though, to get Mr. Lowe or ask Mr. Lowe if he wanted to move over to the Sea King?

A. That's correct.

Q. And was there any other discussion with Mr. Dawson at that time?

Well, yes. I asked him, "Am I going to be working alone?" and he said "Yes." And I said, "Should I continue working on the ladder?" He said, "Finish it."

Q. What were you actually finishing? What were you painting in the morning?

A. Painting all the red lead paint; the primer, we were painting white over that.

Q. Was it on the house that you were painting, or were you painting the deck, or what were you painting?

A. Mostly the house.

Q. Now you've referred to the ladder; was it the same ladder that you were using when you fell later in the day?

A. Yes.

* * * *

[105] Q. So as far as you know, you were the only one aboard that tug after the lunch break at all.

A. That's correct.

Q. So was it your decision then in what order to paint?

A. I thought I'd finish up the housing.

Q. But in terms of exactly where to paint at any given hour, was that left up to you?

A. Yes.

Q. Was it your job to paint until the day was over, or was it your job to finish the house, however, long that took?

A. Just finish the painting.

Q. Well, were you going to stay later than 4:00 if the house was not finished or later than 4:30?

A. That would have depended on Dawson.

Q. Do you know when the tug boat was scheduled to leave?

A. No.

Q. Do you know if the tug boat was scheduled to leave?

A. Yes—do I know what? I'm sorry.

Q. Did you know when it was scheduled to leave?

A. I didn't know.

Q. Once the day was over, had you not been injured, then is it your understanding you would have [106] gone home; you might have received a call; you might not from the standby list, and if not, you'd go back to the union hall the next day?

A. That's correct.

Q. So there was no commitment you'd be back at the Point Barrow the following day?

A. Oh, no, no.

Q. Is my statement correct?

A. That's correct.

Q. Were you on a straight time or an overtime rate?

A. Straight time.

Q. The vessel's engines were idle—

A. That's correct.

Q. —during that entire day?

A. Yes.

Q. There were no ships—permanent ship's officers or a crew aboard?

A. No.

Q. Were you keeping any sort of record of your time; were you just going at the end of the day, say, I worked—

in other words, were you keeping any sort of a log yourself?

A. No.

Q. No?

A. For that day?

* * * *

[109] Q. Were there ladders available on the Sea King?

A. I don't know.

Q. Now I want you to—strike that.

If I understood your earlier testimony correctly, you were coming down the ladder—

A. Yes.

Q. —when you fell?

A. Yes.

Q. And you believe you were two or three rungs from the deck, from the bottom of the ladder.

A. Yes.

Q. And in detail now, exactly how did you fall; where; what happened?

A. The ladder is a little bit towards the starboard side; I was working around the housing.

Q. Let's place the ladder more specifically. Where in relation to the house was the ladder?

A. Off center to the starboard side.

Q. Toward the forward starboard side?

A. No. Forward portside, I'm sorry. Forward portside.

Q. So it's on the forward port—

A. Yes.

Q. —side of the house?

A. (Witness nods head affirmatively.)

* * * *

[112] Q. To another spot to paint a different area?

A. That's correct.

Q. As you were coming down, did you notice the boat rock or whip or roll?

A. No.

Q. Did the ladder move, or did your foot slip?

A. I believe the ladder moved.

Q. So you believe?

A. Well, I don't really remember.

Q. Did it happen so fast that you're really not sure what happened?

A. That's correct.

MR. BOYLE: Wait a minute. You said you believed the ladder moved. Don't talk yourself out of whatever it is you believe.

MR. DANOFF: Well, believing and remembering are somewhat different.

THE WITNESS: Yeah. Well, I do remember it moving on the top part where the wood hit the metal.

MR. DANOFF: Q. Where the wood of the ladder hit the metal of the house?

A. That's right.

Q. Which direction did it move?

A. I believe it was moving towards portside.

* * * *

[118] Q. Okay.

A. And it was sawed off at the point where it was split, I believe.

Q. Okay. So there was no split rung at the time of your accident?

A. Rung?

Q. Rung.

A. Yeah. No, the rung seemed okay.

Q. Was your pay by the hour—

A. Yes.

Q. —on this job.

A. Yes.

Q. I take it when the vessel was going to sail to wherever it was going to sail, you were not going to go on it, correct?

A. I don't believe so.

Q. I asked that question poorly.

Were you going to sail away on the vessel when it left after it was finished?

A. No.

Q. You were planning to go back and continue working on a periodic basis through the union?

A. That's correct.

* * * *

[Proof of Service Omitted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

Date: May 11, 1990
Time: 9:30 a.m.
Courtroom: Judge Legge

DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

Defendant HARBOR TUG AND BARGE COMPANY (HTB), pursuant to Local Rule 220-7, submits the following statement of material facts not in dispute. This is submitted in connection with HTB's Motion for Summary Judgment scheduled for May 11, 1990. References to "Papai" are to the deposition of plaintiff John Papai, taken March 7, 1990.

Dated: April 12, 1990.

GRAHAM & JAMES

By: /s/ Eric Danoff
ERIC DANOFF
Attorneys for Defendant
HARBOR TUG AND
BARGE COMPANY

I. STATEMENT OF UNDISPUTED FACTS

Plaintiff John Papai was injured while painting aboard the tug PT. MARROW (the "Tug"), which was docked at Alameda. The accident occurred on March 13, 1989.

Papai was not a permanent employee of HTB. He worked at various maritime related jobs for various companies. He obtained his maritime jobs through the Inland Boatman's Union (IBU) hiring hall. (Papai, 27-28.) Since the hiring hall is closed on Saturday and Sunday, the IBU sends HTB a standby list of members to call over the weekend for jobs on the following Monday. On Sunday, March 12, Papai was on this list. HTB called him then and asked him to work the following day, and Papai agreed. (Papai, 90-94.) The job was for one day only (Papai, 42, 105-106.)

On Monday morning, March 13, at about 8:00 a.m., Papai arrived at the HTB Dock in Alameda. (Papai, 94.) HTB's Port Captain, Don Dawson, was Papai's supervisor that day. (Papai, 51-52, 95.) Dawson told Papai and Edwin Low, a co-worker, to paint the "house" (the superstructure) on the Tug. (Papai, 96-97.) The house had already received a prime coat of paint, so their job was to put on the finish coat of paint. (Papai, 97, 99.)

The Tug was tied to the dock. (Papai, 84.) The Tug was unmanned; no officers or crew members were aboard that day. (Papai, 51, 105-106.) The Tug was "dead" in the water; its engines were not running during the day. (Papai, 106.)

Papai and Low went to the Tug and began painting. They received no specific directions about how to do the work. (Papai, 96-97.) Dawson came by a couple of times during the morning. (Papai, 98-99.)

In the late morning, Dawson asked Low to shift over and work on another tug across the dock. (Papai, 99.) Low did so, and thereafter Papai worked alone. (Papai, 97.)

After a lunch break from about noon to 1230, Papai returned to the Tug and resumed painting alone. (Papai, 97-98.) No one else was aboard the Tug that afternoon. (Papai, 82, 98.)

At about 3:30 p.m., Papai was painting at the forward side of the house. He was using a portable ladder. He claims that as he was climbing down the ladder, the ladder "moved", causing him to fall off and injure his knee. (Papai, 109, 112.)

Papai began working in 1968. Between 1968-1972 he worked as a mail clerk for the federal government. (Papai, 10-11.) From 1972-1977 he owned and managed a bar. (Papai, 11-12.) From 1979-1983 he worked as a bartender at various shoreside establishments. (Papai, 15-17.) From about 1983-1986 he worked for Red & White Catering, which performed catering services for party boats and ferry boats. He worked aboard the boats but lived at home. The catering company that employed him did not own or operate the boats. His supervisor on that job worked for the caterer, not the boat owners, and he did not take any instructions from the boats' captains or crew. His job was to help stock the boat with food, set up, serve the food, and clean up afterward. (Papai, 18-21, 24-26.)

Beginning in 1987, Papai began getting jobs out of the IBU hiring hall in San Francisco. (Papai, 18-21, 24-26). From then until the date of the accident Papai worked at various jobs for various employers. Most of the jobs were for one day, but some were for two or three days. (Papai, 37-38.) The longest job he had was for 40 days working for the Golden Gate Transit District. That job consisted of chipping rust and painting on the dock at the S.F. Ferry Terminal. (Papai, 27-28.) Usually, however, once Papai finished a job for the day, he would go back to the IBU hiring hall the next day to put in for another job. He worked as a "casual." (Papai, 93.)

The jobs Papai had during the 1987-March 1989 period consisted mostly of maintenance work, deck hand work, and longshoring work. Maintenance work consisted of chipping rust and painting. This was done while boats were tied to a dock. (Papai, 29.) Deck hand work consisted mainly of manning the lines on boats during docking and undocking. That was done on boats that were working. (Papai, 28-29.) Longshoring work consisted of helping to load and discharge vessels that were docked. (Papai, 32-33.) He also did some shoreside bartending during this period. (Papai, 33-34.) During the 1987-March 1989 period Papai lived, ate and slept at home.

In 1989, before the date of his accident, Papai had worked for HTS a total of thirteen (13) days. (Papai, Ex. 1.) The last time was about nine (9) days before the accident. (Papai, 94, 96.) Each time Papai had worked on the Tug, he had performed maintenance work only, not deck and hand work. (Papai, 57-58.) The Tug always was tied to the dock when Papai had worked on it. (Papai, 41, 51-52.) The job Papai had on the day of his accident was a one day job. (Papai, 42.) Papai was not going to sail with the Tug; he was to go back to the IBU hiring hall the next day to see if he could get another job. (Papai, 118.) Papai was paid hourly, including on the day he was injured. (Papai, 50.)

[Proof of Service Omitted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

Date: May 18, 1990
Time: 9:30 a.m.
Courtroom: Judge Legge

**DECLARATION OF MARINA V. SECCHITANO IN
OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

I, MARINA V. SECCHITANO, declare under penalty of perjury as follows:

1. I am the Regional Director, Inlandboatman's Union of the Pacific, of which the plaintiff JOHN PAPAI is a member.
2. I dispatched Mr. Papai to the POINT BARROW to work as a deck hand on March 13, 1989.
3. A copy of the dispatch slip is attached hereto as Exhibit B.
4. Mr. Papai was specifically dispatched as a deck hand to replace one of the deck hands more regularly assigned to the POINT BARROW.
5. I have no reason to believe that the POINT BARROW was either unmanned or non-navigational on March 13, 1989.
6. The fact that no *permanent* officers or crew members were aboard does not mean that no crew members

were aboard the POINT BARROW because Mr. Papai and Mr. Low were serving as deck hands on March 13, 1989, in place of the two deck hands, which is the total complement of deck hands for a tug such as this when it is manned.

7. There is no such document as "ship's articles" for a tug such as the POINT BARROW.

8. The fact that the engines of a tug such as the POINT BARROW were not running during the day of March 13, 1989, while it was tied to the dock does not mean that this tug was "dead in the water" or somehow withdrawn from navigation. These engines often are not run unless the tug actually gets underway on its own power.

9. I have no reason to believe that the engines of the tug POINT BARROW or any related equipment were not operable on March 13, 1989.

10. The circumstances under which Mr. Papai was dispatched to the POINT BARROW are in no way similar to those discussed in the cases of *Baker v. Pacific Far East Lines*, and *Buna v. Pacific Far East Lines*, cited in defendant's motion.

11. Specifically, Mr. Papai was not dispatched on March 13, 1989, to be a member of any maintenance and repair gang; he was dispatched to the tug POINT BARROW to be a deckhand in this tug's operational crew and to spend his time aboard that tug performing work routinely done by its deck hands, which includes the painting of the tug's deck house.

12. The circumstances under which Mr. Papai was dispatched to the POINT BARROW did not leave defendant with the option of assigning him to work shore-side; shoreside jobs are dispatched differently.

13. Personnel specifically dispatched to shoreside jobs do not accrue union deck hand seniority and are neither paid nor classified as deck hands.

Executed at San Francisco, California, on April 30, 1990.

/s/ Marina V. Secchitano
MARINA V. SECCHITANO

[Certificate of Service Omitted]

INLAND MARINE DIVISION
INLAND BOATMEN'S UNION OF THE PACIFIC
801 ARMY STREET, SAN FRANCISCO • (415) 528-0356

32029

Company HTB Date 3-13-89
Dispatcher Sticks Time 0800 Rec. by HTB

Classification LD/4 ASAP MAINT. None
Job Description Alameda
Name/Book No. Q. J. Papai by Phone
Social Security No. 0845
Time Dispatched 0845 Dispatched by H. Fleischman

I.L.W.U. DISPATCH SLIP MARINE DIVISION
INLAND BOATMEN'S UNION OF THE PACIFIC
801 ARMY STREET, SAN FRANCISCO • (415) 528-0356

32030

Company HTB Date 3-13-89
Dispatcher Sticks Time 0805 Rec. by HTB

Classification LD/4 ASAP MAINT. HD
Job Description Alameda
Name/Book No. E. Low By Phone
Social Security No. 0845
Time Dispatched 0845 Dispatched by H. Fleischman

I.L.W.U. DISPATCH SLIP MARINE DIVISION
INLAND BOATMEN'S UNION OF THE PACIFIC
801 ARMY STREET, SAN FRANCISCO • (415) 528-0356

32031

Company Major Date 3-13-89
Dispatcher Sticks Time 0830 Rec. by HTB

Classification LD/4 ASAP MAINT. HD
Job Description Alameda
Name/Book No. Q. J. Papai by Phone
Social Security No. 0845
Time Dispatched 0845 Dispatched by H. Fleischman

I.L.W.U. DISPATCH SLIP MARINE DIVISION
INLAND BOATMEN'S UNION OF THE PACIFIC
801 ARMY STREET, SAN FRANCISCO • (415) 528-0356

32032

Company Major Date 3-13-89
Dispatcher Sticks Time 0830 Rec. by HTB

Classification LD/4 ASAP MAINT. HD
Job Description Alameda
Name/Book No. Q. J. Papai by Phone
Social Security No. 0845
Time Dispatched 0845 Dispatched by H. Fleischman

I.L.W.U. INLAND BOATMEN'S UNION OF THE PACIFIC 32037
801 ARMY STREET, SAN FRANCISCO • (415) 836-0336

Company Harbor Tug Date 3-13-89 Time 0805
Dispatcher Dunbar Rec. by AS
Classification Call for Orders 546-266
Job Description: 1st Mgmt. Duties
Days on base 11/2
Name/Book No. Tracy
Social Security No. 1000 Dispatched by J. Smith
Time Dispatched 1000

I.L.W.U. DISPATCH SLIP MARINE DIVISION 32038
INLANDBOATMEN'S UNION OF THE PACIFIC
801 ARMY STREET, SAN FRANCISCO • (415) 836-0336

Company Harbor Tug Date 3-13-89 Time 0805
Dispatcher Dunbar Rec. by AS
Classification Call for Orders 546-266
Job Description: 1st Mgmt. Duties
Days on base 11/2
Name/Book No. Bunch
Social Security No. 1000 Dispatched by J. Smith
Time Dispatched 1000

I.L.W.U. DISPATCH SLIP MARINE DIVISION 32039
INLANDBOATMEN'S UNION OF THE PACIFIC
801 ARMY STREET, SAN FRANCISCO • (415) 836-0336

Company Harbor Tug Date MARCH 14, 1989 Time 0835
Dispatcher Hicks Rec. by K. P. Adams
Classification 1st Mgmt. Duties
Job Description: SP4 DUKE CROCKETT
Name/Book No. BY PHONE Tom RYAN
Social Security No. 1000 Dispatched by J. Smith
Time Dispatched 0900

I.L.W.U. DISPATCH SLIP MARINE DIVISION 32040
INLANDBOATMEN'S UNION OF THE PACIFIC
801 ARMY STREET, SAN FRANCISCO • (415) 836-0336

Company Golden Gate Date March 14, 1989 Time 0800
Dispatcher Hicks Rec. by K. P. Adams
Classification 1st Mgmt. Duties

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

**FIRST AMENDED COMPLAINT FOR PERSONAL
INJURIES AND DAMAGES UNDER SECTION FIVE
OF THE LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT; LOSS OF CONSORTIUM**

**CLAIMS UNDER THE LONGSHOREMEN'S
AND HARBOR WORKERS' COMPENSATION ACT
AND THE GENERAL MARITIME LAW**

1. *Jurisdiction*: This action arises under Section Five of the Longshoremen's and Harbor Workers' Compensation Act and the general maritime law, as hereinafter more fully appears.

2. At all relevant times, defendant owned, managed, operated and controlled the vessel, M/V POINT BARROW, (hereinafter referred to as "the vessel") and used the vessel in navigation and commerce in navigational waters.

3. At all relevant times, plaintiff JOHN PAPAI was employed by defendant as a deck hand of the vessel, and was in service of the vessel.

4. On or about March 13, 1989, while acting within the scope of his maritime employment, plaintiff JOHN PAPAI was caused to suffer serious personal injuries as the direct proximate result of the negligence of defendant, defendant's employees, agents and representatives, and the

unsafe condition of the vessel, in that defendant and the vessel:

- a) failed to furnish plaintiff JOHN PAPAI with a reasonably safe place to work;
- b) failed to furnish plaintiff JOHN PAPAI with reasonably safe, suitable and/or proper equipment to perform ordered tasks;
- c) failed to provide plaintiff JOHN PAPAI with efficient able-bodied help so as to safely perform ordered tasks;
- d) placed plaintiff JOHN PAPAI in an unsafe position under the conditions existing at the time and place of the aforementioned injuries;
- e) failed to adequately inspect and ensure the proper operation of the vessel's men and machinery so as to obviate the risk of injury to its employees;
- f) failed to properly maintain the vessel's equipment in good working order so as to obviate the risk of injury to its employees;
- g) failed to instruct plaintiff JOHN PAPAI as to the safe and proper manner in which to perform her tasks;
- h) failed to operate the vessels in a safe manner, which did render the vessels and their attendant gear, tackle and appliances unsafe;
- i) failed to provide plaintiff JOHN PAPAI with a safe place to work, safe vessel and competent crew, which did render the vessel and its attendant gear, tackle, and appliances unsafe;
- j) had the knowledge, ability and control to correct said unsafe conditions prior to the occurrence of the injury; and
- k) otherwise breached their duties owed to plaintiff JOHN PAPAI under the circumstances.

4. As a direct and proximate result of the foregoing, plaintiff JOHN PAPAI has suffered and will continue to suffer general damages; wage loss; hospital and medical expenses; loss of earning capacity; and inability to lead a normal life.

5. At all pertinent times defendant was guilty of malice, fraud and oppression and plaintiff JOHN PAPAI should recover, in addition to actual damages, damages to make an example of and punish defendant.

CLAIMS FOR LOSS OF CONSORTIUM

6. Plaintiff JOANNA PAPAI hereby refers to and incorporates herein by this reference each and every allegation contained in paragraphs one through five of this Amended Complaint, as though fully set forth at length.

7. At all material times herein, and at present, plaintiffs JOHN and JOANNA PAPAI were husband and wife.

8. Under the general maritime law, incident to plaintiff JOHN PAPAI's claims for damages under Section Five of the Longshoremen's and Harbor Workers' Compensation Act, plaintiff JOANNA PAPAI is likewise entitled and empowered to recover loss of care, comfort and society, support and enjoyment of her husband, proximately caused by defendant's negligence and the unsafe conditions of its vessel.

9. In her own right, plaintiff JOANNA PAPAI, seeks damages against defendant, incident to recovery by plaintiff JOHN PAPAI, in a sum in excess of \$500,000.00, which sum represents a fair and reasonable estimate of the monetary value of the loss of care, comfort, society, enjoyment and support which JOANNA PAPAI has endured as a result of the injury to her husband JOHN PAPAI.

WHEREFORE, plaintiff prays judgment against defendants and each of them, as follows:

- (1) for general damages in a sum according to proof and in excess of \$1,000,000.00;
- (2) for medical expenses, past and future, according to proof;
- (3) for loss of earnings, past and future, according to proof;
- (4) for damages for loss of consortium on behalf of plaintiffs JOANNA PAPAI, in a sum in excess of \$500,000.00;
- (6) for such other and further relief as the Court may deem just and proper.

SULLIVAN, JOHNSON & BOYLE

/s/ Thomas J. Boyle
 THOMAS J. BOYLE
 Attorneys for Plaintiffs
 John Papai and Joanna Papai

JURY TRIAL DEMANDED

Plaintiffs hereby demand trial by jury.

SULLIVAN, JOHNSON & BOYLE

/s/ Thomas J. Boyle
 THOMAS J. BOYLE
 Attorneys for Plaintiffs
 John Papai and Joanna Papai

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

Date: February 28, 1992
 Time: 9:30 a.m.
 Courtroom: Judge Legge

DECLARATION OF THOMAS J. BOYLE

I, Thomas J. Boyle, am an attorney with SULLIVAN, JOHNSON & BOYLE, 100 Pine Street, 27th Floor, San Francisco, California, attorneys for Plaintiffs John Papai and Joanna Papai. On July 9, 1990 I attended the deposition of Marina V. Secchitano. Attached hereto are copies of pages from the transcript of that deposition.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct to the best of my knowledge.

Executed in San Francisco, California on February 14, 1992.

/s/ Thomas J. Boyle
 THOMAS J. BOYLE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

DEPOSITION OF MARINA V. SECCHITANO

July 9, 1990

* * * *

[14] Q. What did you review?

A. I think everything in my file here.

Q. Did you do that to help prepare for this deposition?

A. Yes.

Q. May I see what's in your file, please?

A. Sure.

Q. The first thing in the file is something called Deckhands Agreement. What is your understanding as to what this is, this agreement?

A. I don't understand the question.

Q. You have the Deckhands Agreement in the John Papai file. What is it about this agreement that is relevant, in your mind, to John Papai's case?

A. The section where it refers to maintenance, to what compensation will be paid someone working under that labor agreement.

Q. Can you tell me what section that is?

A. Maintenance and cure.

Q. So article 12. Is this the article that you were referring to?

A. Yes.

* * * *

[21] Q. Attached to the declaration as Exhibit B are some records. What do you call these records?

A. IBU dispatch slips.

Q. Are the IBU dispatch slips attached as Exhibit B in your handwriting?

A. Yes.

Q. Now, Mr. Papai has stated that his work on March 13, which was a Monday, started at 8:00 a.m. and that he received a phone call on Sunday night from HTB to come on Monday.

Is your information any different from that?

A. Yes.

Q. What is your understanding as to how Mr. Papai was dispatched for the job on March 13?

A. The dispatch slip indicates that he was telephoned at 8:45 March 13th to go to work as a deckhand as soon as possible.

Q. Is there a list prepared for Harbor Tug and Barge—strike that.

During a weekday other than Monday, if Harbor Tug and Barge wants an IBU member to come out and work, how is it that a worker is assigned?

A. I don't understand the question.

* * * *

[45] Q. Is there some category of IBU members that are shoreside and a different category that are non-shoreside?

A. Yes.

Q. Is Mr. Papai in a category that is exclusively non-shoreside?

A. Yes.

Q. What is the shoreside category?

A. Terminal attendant for Golden Gate Ferry.

Q. Is that the only shoreside—

A. Grounds keeper for Harbor Tours.

Q. Are those the people who are not qualified to be deckhands?

A. Correct.

Q. Can somebody who is qualified to be a deckhand be, if they want to be, assigned to a shoreside job?

A. I don't understand the question.

Q. If Mr. Papai said, I want the next available shore-side job, I'm willing to wait, could he be assigned to that job if his card came up?

A. I'm still not clear on what you mean. Could you rephrase that. I generally don't understand.

* * * *

[54] Q. Is there any union rule that makes a distinction between a deckhand and deckhand maintenance man?

A. Qualified, I think is the term.

Q. Qualified what?

A. If you ask for someone to do maintenance, as the employer, we are obligated to send you someone that can do maintenance.

Q. Maintenance can be painting?

A. Can be. It's in the agreement.

Q. Can be chipping?

A. Can be.

Q. Can be splicing?

A. Can be. All things that you don't need to know at Golden Gate Ferry per se or Harbor Tours per se.

Q. If Harbor Tug and Barge calls in and wants a deckhand to do maintenance and somebody on the A list has seniority and has his card in and wants the job, do you do any further investigation as to whether that person can splice rope or do other things?

A. We ask them.

* * * *

**EXCERPTS FROM
HARBOR TUG AND BARGE COMPANY
AND
INLANDBOATMAN'S UNION OF THE PACIFIC
DECKHANDS AGREEMENT**

* * * *

TOWBOAT AGREEMENT

PREAMBLE: The rules contained herein constitute agreements made by and between HARBOR TUG AND BARGE COMPANY, herein referred to as the "Employer", and the INLANDBOATMEN'S UNION OF THE PACIFIC, ILWU, MARINE DIVISION, herein referred to as the "Union", prescribing duties, wages, hours, manning and other terms and conditions of employment on vessels of the Employer:

**WITNESSETH:
GENERAL RULES**

Article 1. Union Shop, Seniority & Method of Employment

By separate agreement the Employer and the Union have agreed to and established terms providing for Union Security and Method of Employment procedures.

Article 2. Equal Opportunity

During the term of this Agreement neither party shall discriminate against any employee or applicant for employment because of race, color, sex, age, religion, national origin, handicap, or status as a disabled veteran or Vietnam era veteran. This nondiscrimination policy shall include, but not be limited to, the following: employment, promotion, upgrading, transfer, layoff, demo-

tion, termination, rates of pay, forms of compensation, recruitment advertising and selection for training.

The Employer shall not discriminate against any employee for his or her activity in behalf of or membership in the Union.

Article 3. Compliance with Law

(a) The Employer and the Union agree that in the event any provision or provisions of this Agreement are held to be void as being in contravention of any laws, rules or regulations, nevertheless, the remainder of this Agreement will remain in full force and effect, and the parties shall immediately meet to negotiate new provisions to replace the void provisions. It is further agreed that each article of this Agreement is separate and distinct and would have been entered into without regard for any other article.

(b) It is mutually agreed that the Employer and the Union will comply fully with all provisions of all Federal laws, State and local laws, and Presidential Executive Orders, all to the end that no person shall improperly be excluded from participation in, or be denied the benefits of full access to, the procedures of Article 1 of this Agreement, or be otherwise subjected to discrimination.

Article 4. Agreement May Not Be Amended Except by Written Document

The parties realize that not infrequently, after agreements similar in part to this Agreement have been executed, one party thereto will contend that the other party has at some time during negotiations agreed to amend, modify, change, alter or waive one or more provisions of the Agreement, or that by the action or inaction of such other party, the Agreement has been amended, modified, changed or altered in some respect. With this realization in mind and in order to prevent such contention being

made by either party hereto, insofar as this Agreement is concerned, the parties have agreed to and do hereby agree that no provision or term of this Agreement may be amended, modified, changed, altered or waived except by a written document executed by the parties hereto.

* * * *

Article 11. Disability Pension and Health and Welfare Contributions

If an employee becomes disabled and the disability is occupational (occurring on the job) the Employer agrees to continue paying his Pension and Health and Welfare Plan contributions for a period of up to one (1) year of bona fide disability.

In no case will the Employer pay more than the maximum straight time monthly hours.

Article 12. Maintenance and Cure

(a) Crew members are entitled to maintenance and cure, on account of injury or illness incurred in the service of the vessel, and shall be paid maintenance at the rate of twenty-two dollars (\$22.00) per day. Except in hardship cases, the Employer shall not be required to make payments under this rule more often than semi-monthly.

Under the above provision, wages, maintenance and cure shall be paid promptly on presentation of a medical record indicating generally the nature of the illness or injury.

Wages, maintenance and cure shall not be withheld in any case merely because the claimant has also submitted a claim for damages or has filed suit therefor or is taking steps to that end.

If the disability is caused by injury received in the service of the employer, and all weekly disability benefits have been exhausted, and proof of termination of these

benefits has been provided to the company by the employee, than the rate at which maintenance is paid shall be increased to thirty-five (\$35) dollars per day.

* * * *

(i) Employee may be granted leaves of absence limited, except in case of physical disability, to six months in any year, without loss of seniority. Retention of seniority during a longer leave of absence may be arranged by agreement between the Employer and the Union. Leaves of absence will not be granted to employee to work in other industries or companies unless mutually agreed to between the Employer and the Union. Any leaves of absence shall be reduced to writing with an approved copy sent to the Union.

Article 23. Wages

(a) The minimum basic rates of pay shall not be less than the following:

Classifications	9/15/87 Hourly	9/15/90 Hourly	9/15/91 Hourly
Qualified D/H Cook S.T. Hourly Rate	\$16.41	\$16.90	\$17.41
Qualified D/H S.T. Hourly Rate	\$15.86	\$16.34	\$16.83

Employees hired into the Qualified Deckhand classification on or after ratification of this agreement with less than 750 hours of work with a CMC tugboat company within the preceding two (2) years, will receive fifteen percent (15%) reduction in the published wage rate for the qualified deckhand. That fifteen percent (15%) reduction shall remain in effect for the first 750 hours worked in the qualified deckhand classification.

Upon completion of the first 750 hours of work in the Qualified Deckhand classification, the employee shall re-

ceive a seven and one-half percent (7½%) pay increase. This new rate will remain in effect through the subsequent 750 hours of work. At the conclusion of this second 750 hours of work, the individual will be paid as a fully Qualified Deckhand.

Those individuals not having the required 750 hours with a CMC tugboat company but having like experience will be considered on a case by case basis.

(b) In addition to wages stipulated herein, soaps, towels, linens weekly when required, and other essential supplies within reason, will be provided.

(c) Where subsistence is not furnished, employees classified herein will be paid subsistence of seven dollars (\$7.00) for work exceeding four (4) hours or fifteen (\$15.00) for work exceeding eight (8) hours. Subsistence allowance shall not exceed fifteen dollars (\$15.00) in any twenty-four (24) hour period.

When subsistence is furnished on the boats, reasonable grocery orders will be filled as ordered. Shortages will be made up within twenty-four (24) hours. No dated food shall be given that will expire during the shift.

(d) In order to be employed as a qualified deckhand, he or she must provide, if requested to do so to the satisfaction of the Employer, that he or she:

1. Has good knowledge of vessels lines and towing winch, the placement, use and names of same.
2. Has fair knowledge of splicing lines.
3. Is a satisfactory helmsman and lookout.
4. Can satisfactorily chip, scale and care for the metal parts of a vessel.
5. Can satisfactorily paint when requested and do the necessary cleaning chores upon completion for the day.

6. Can properly care for and use tools.
7. Can do such other things required of a deckhand in order to work safely.

Any person who is classified as a qualified deckhand shall not be reduced in rating.

(e) Casual employees will be paid twelve (12) hours straight time when working on twenty-four (24) hour boats. Overtime will be paid for hours worked in excess of twelve (12) hours. When a casual is replacing a regular employee as a vacation or sick relief he/she shall be entitled to the same guarantee as the regular employee replaced. Any employee who has less than one (1) year company seniority shall receive vacation pay for each and every hour worked or paid for as follows:

Take the existing monthly wage and multiply it times twelve (12) months, divide the result by twenty-six (26) weeks, divide the result by two thousand seventy-six (2,076) hours. This figure equals the hourly rate of vacation pay in cents. (Round to the nearest full cent.) The total accumulated vacation pay shall not exceed the amount of vacation pay for a regular Deckhand in any twelve (12) month period.

(f) a Deckhand/Cook, when carried aboard, will work as a swing person, performing duties as required. The duties of this position will include, but not be limited to, cooking, storing of the vessel, deck maintenance and repair.

Article 24. Overtime

(a) Overtime at time-and-a-half the regular straight-time rate shall be paid for:

- (1) hours worked in excess of 12 hours a day;

- (2) hours worked on the employee's designated days off;
- (3) all hours worked on the 7th day.

* * * *

(c) Employees shall not be required to work Thanksgiving Day, Christmas Day, or New Year's Day, and will not be discriminated against for refusal to work these days.

Article 30. Maintenance Work and Duties

(a) During the time on duty the deckhand's duties shall consist of tying up and letting go as required by the operation and normal maintenance work on the boat shall be performed during the hours of eight (8:00) a.m. to four (4:00) p.m. No maintenance work shall be required on Sundays or holidays.

(b) Deckhands will be required to perform maintenance work in the engine room.

(c) Sanitary work shall be performed as needed any time, but no unessential sanitary work shall be required on Sundays or holidays, or at night that could be deferred until the next day.

It is the considered opinion of all parties that each employee should adequately maintain his/her vessel within these limits. All employees shall share equally in this responsibility.

(d) The on-watch deckhand shall conduct a check of the engine room status a minimum of two (2) times each watch while underway for vessel safety reasons and report same to the operator.

* * * *

Letter of Understanding—1

to the Agreement

Between

Harbor Tug and Barge Company

and the

Inlandboatmen's Union of the Pacific,

Marine Division of the International

Longshoremen's and Warehousemen's Union

San Francisco Region

The above parties agree as follows:

During the term of the Agreement, it is agreed the Union will refer applicants, who have not previously been employed by Harbor Tug and Barge Company, for interview prior to his/her being dispatched for work through the Union's Hiring Hall.

Signed for the Employer: Signed for the Union:

By /s/ [Illegible]

By /s/ [Illegible]

Date 7/8/88

Date 7/8/88

Letter of Understanding—4

to the Agreement

Between

Harbor Tug and Barge Company

and the

Inlandboatmen's Union of the Pacific,

Marine Division of the International

Longshoremen's and Warehousemen's Union

San Francisco Region

The above parties agree as follows:

During the term of the Agreement, a dispatch procedure for other than 7-day-on/7-day-off vessel Deckhands will be developed and established. The Deckhand unit will decide upon the dispatch procedure to be placed in effect and the date of its implementation.

It is understood that the procedure currently in effect will continue until such time as a new procedure is developed and placed in effect.

Signed for the Employer: Signed for the Union:

By /s/ [Illegible]

By /s/ [Illegible]

Date 7/8/88

Date 7/8/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

Date: February 28, 1992
Time: 9:30 a.m.
Courtroom: Judge Legge

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

Defendant and the Inland Boatman's Union of the Pacific (IBU) are parties to a Deckhands Agreement, (Secchitano Deposition page 14 line 22) which requires that all HTB deckhands be members of the IBU (2) at 8:05 a.m. on March 13, 1989, a representative of HTB telephoned the IBU hiring hall, requesting two deckhands to perform maintenance that day on HTB's tug, Point Barrow, at the Home Dock in Alameda (Secchitano Deposition page 21 lines 15-17) and that under the union contract, maintenance, including painting, is an integral part of the duties of a deckhand. (Secchitano Deposition page 54 lines 3-23).

Papai, an IBU member works exclusively non-shoreside had already worked for defendant as a deckhand on 12 previous occasions in 1989. (Secchitano Deposition page 45 lines 5-7).

SULLIVAN, JOHNSON & BOYLE

/s/ Thomas J. Boyle
THOMAS J. BOYLE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

San Francisco, California
December 16, 1992

COURT'S RULINGS

EXCERPTED TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES A. LEGGE, JUDGE

* * * *

[2] THE CLERK: Calling Civil 90-0111, John Papai, et al., v. Harbor Tug and Barge, et al.

Counsel, state your appearances.

MR. BOYLE: Thomas Boyle for Plaintiffs.

MR. DANOFF: Eric Danoff of Graham & James for the Defendant Harbor Tug and Barge.

THE COURT: All right.

THE COURT: All right.

The case has been tried over a period of several days to the Court, sitting without a jury. And then post-trial briefs have been filed.

And I read the deposition of Captain Mc Isaac that was submitted to me. I've, of course, heard the evidence. And I've gone back and reviewed my notes of the evidence. And I have reviewed the exhibits which have been submitted.

I'm prepared to rule at this time on the liability question.

Now, first of all, the legal framework in which we find ourselves.

The case initially started out as a seaman's case. I made a determination early in the case that I did not believe Mr. Papai was a seaman, and hence not entitled to the Jones Act [3] and doctrine of unseaworthiness benefits.

So the action—and that is a conclusion which I reaffirm. And of course is a subject which Mr. Papai is free to take up with the Court of Appeals.

The legal issues, therefore, in this case in the trial before me are framed under Section 905(b) of the Longshore and Harbor Workers' Act, and general principles of negligence.

And it's of course clear that the plaintiff bears the burden of proof by a preponderance of the evidence.

A few other legal matters.

I think that the defendant's duties as the operator of the tug are governed by the principles set forth by the U.S. Supreme Court in the *Scindia*, S-c-i-n-d-i-a, decision.

And I believe that the defense is correct that the defendant here can be liable only as the operator or the tug. And if things were done in its capacity as the employer of Mr. Papai, rather than his operator, there can't be liability.

With respect to the OSHA standards, I think everybody now agrees that the OSHA standards are relevant to determining the question of duty of care. Not necessarily controlling, no per se rule; and, of course, they do not answer the question of who has the duty to comply with the standard of care.

Now, what happened?

We have no evidence of what—of how the accident occurred, and what occurred there, other than Mr. Papai's [4] testimony. That is, it's a somewhat unusual case in which there is nobody at the scene. Even Mr. Low comes along a bit later.

So it's really Mr. Papai's testimony that has to establish that there was something the matter with the arrangements that he was given, and in essence to prove that the ladder slipped. And he did say that during his trial testimony.

So I think that the question really in determining liability is a search for corroboration, and it's a search for credibility.

On the issue of corroboration we really have only one thing—and maybe not even that—that supports Mr. Papai's version, and that is the trial testimony of Mr. Low.

However, Mr. Low, as a witness, I don't think has a great deal of credibility. I think his demeanor on the witness stand was such that he's—can be kind of led into saying whatever anybody on either side of the case wants him to say at the moment.

And indeed his testimony in the trial was inconsistent with the testimony of Mr. Michel, dealing with Mr. Michel's interview with Mr. Low back in 1989.

The other corroboration; that is, the other evidence that we could look to for corroboration, is really totally against Mr. Papai.

That is, the record at the time establishes the exact contrary of what Mr. Papai wants to establish and testify to at [5] trial: his statements to Dawson; his statements to Clinton; the formal—formal injury report, which I recognize is not prepared by Mr. Papai, but obviously the preparer of it was attempting to relate what he was told.

We don't have any instances in which Mr. Papai, other than on the witness stand, says the ladder slipped or was defective.

The accident report he gives to his doctor says that he missed the last step, twisted his knee, and fell.

According to Michel, Low said that Papai slipped and hit his knee on a rung while climbing down the ladder.

His deposition testimony is equivocal, in the sense he says he doesn't really remember what happened.

I realize that's in the context of quite a bit of other testimony.

And there is the fact that the ladder remained upright, for whatever weight that might have.

What I'm saying is that the search for corroboration produces none. And indeed produces a lot of matters inconsistent with Mr. Papai's statements at trial about how the accident occurred.

Dealing with the general subject of credibility, I think Mr. Papai is an honest and straightforward person. But I do have some questions about his statements in connection with the case; the general question of credibility, totally apart [6] from the—well, I shouldn't say "apart"; I've already recited the matters where I believe Mr. Papai's statement at trial was inconsistent with his other testimony.

In addition, I find it difficult to fathom that Mr. Papai in going to a doctor and seeking treatment for his knee, and compensation for his knee injury, doesn't disclose the fact of his prior operation on the same knee.

I also think his testimony regarding what he was doing in trying to look for a job and get himself retrained was really straining credibility also.

Mr. Papai is an intelligent person. He's—he has a gift of intelligence that's above standard, above level. I believe there are a lot of positions that are open and available for him, if he would pursue the effort of finding them.

The fact is that the whole case, the liability case, the causation, the damages, the medical, the other, just seems to have been pushed to the utmost limit by Mr. Papai, and perhaps by his counsel, without really a lot of solid evidence—or much solid evidence to back it up.

So I am finding by a preponderance of the evidence that Mr. Papai has not sustained his burden of proof on liability; that the ladder did not slip, but that Mr. Papai was instead injured by slipping, or missing a rung, or . . . improperly stepping down, however you want to frame it.

I also believe that Mr.—that the defense has [7] established that Mr. Papai did have some choices. He may perhaps not be the type of person to avail himself of those choices, particularly when it may put him in a confrontational position with his employer, but I think he did have choices as to what tools and what equipment to use. And that he, as much as anyone else, made the choice of which ladder and which equipment to use and how to go about using it.

So for all those reasons I am finding that Mr. Papai has not sustained his burden of proof on the issue of negligence, either under 905 of the Act, or under general negligence principles.

So the question of liability must be determined in favor of the defense, and against the plaintiff.

So I then need not proceed to questions dealing with the medical or economic aspects of damages.

So I will direct that judgment be entered in favor of the defendant. And ask that . . . the defendant submit a proposed form of order, and a proposed form—well I guess just a proposed form of judgment is all we need. And state on the record—state in the judgment that I have given the reasons for my . . . conclusions and findings and judgment on the record in open court.

So in the event that Mr. Papai appeals the court of appeals will have my comments in one place.

I might say, Mr. Boyle, I think you did all you could. [8] I can't conceive a better presentation or . . . a more vigorous prosecution of it, but I just don't think the evidence was able to sustain it.

But I think you did as good a job as you possibly could.

MRS. PAPAI: (From audience of courtroom) Judge

THE COURT: Yes, ma'am.

MRS. PAPAI: . . . my husband is probably one of the most honest men—

MR. BOYLE: Mrs. Papai—

MRS. PAPAI: —God ever created—

MR. BOYLE: —I dont—

MRS. PAPAI: —and he is not someone to tell lies—

MR. BOYLE: Mrs. Papai, I don't want you to—

THE COURT: Well, just a second.

MRS. PAPAI.—he's not someone who would be able to figure out what you need to hear—

THE COURT: Ma'am—

MRS. PAPAI: And he just didn't know what to tell you.

He told me that night that he came home the ladder went out from under him.

And I don't care what you people in suits say.

(Mrs. Papai leaving courtroom.)

MR. BOYLE: Sorry, Your Honor.

[9] THE COURT: Well, that's quite all right, Mr. Boyle.

She's certainly entitled to express her feelings on the subject, and I'm sure she has a direct personal interest in it.

And litigants often don't understand that both you, as lawyers on both sides, and I, as a judge, have to make our decisions based upon the record of admissible evidence.

And husbands and wives and friends do have feelings about these things.

All right. Thank you very much, counsel.

MR. DANOFF: Thank you, Your Honor.

[Certificate of Reporter Omitted]